93-401

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ALABAMA,

PETITIONER - APPELLEE,

V.

WILLIAM PELHAM BROWNING,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[28 U.S.C. §2254 PROCEEDINGS]

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court exceeded its scope of review in federal habeas corpus and granting relief on a non-federal constitutional issue, thus violating Beck v. Washington, 369 U.S. 541 where it granted habeas relief because the Alabama Court of Criminal Appeals had misapplied state law in determining that the prosecution did not have the burden of proof to exclude certain types of non-marijuana plant material when it sought to prove that Respondent possessed over 2.2 lbs of marijuana in violation of the state trafficking statute?

II. Whether the District Court misapplied Jackson v. Virginia, 443 U.S. 307, to grant habeas relief on the claim that the State's evidence was insufficient to sustain the trafficking conviction, where the State clearly established that Respondent possessed 4.8 lbs of marijuana plant material and where the alleged insufficiency was the failure of the prosecution

to disprove an affirmative defense based upon the fact that some plant material might have been excludable upon a proper showing of proof.

THE PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The original opinion of the United States Circuit Court of Appeals for the Eleventh Circuit affirming the granting of the writ is non-published, see Appendix "C".

The Recommendation of the Magistrate Judge and the Order of the District Court are contained in the attached Appendix "B".

The State court's opinion affirming Respondent's conviction is reported as Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was rendered on June 2, 1993. This Court has jurisdiction under 28 U.S.C. §1254(1), as amended (by Public law 100-352) on June 27, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in pertinent part)

"No person ... shall be deprived of life, liberty or property, without due process of law" made applicable to the states through the XIV Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

§20-2-80, Code of Alabama (1975)

Appendix "A"

§20-2-2(15), Code of Alabama (1975)

Appendix "A"

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On November 29, 1987, Respondent William Pelham Browning was indicted by the Grand Jury of Baldwin County, Alabama, for the crime of trafficking in marijuana, in violation of

§20-2-80, Code of Alabama (1975).[1] On April 7, 1988, a jury returned a verdict of guilty as charged and he was sentenced to twelve (12) years in the state penitentiary.

The conviction was affirmed on appeal by the Alabama Court of Criminal Appeals in a written opinion. Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989). His petition for writ of certiorari to the Alabama Supreme Court was denied on August 25, 1989.

Respondent filed this federal habeas corpus petition on May 5, 1991, in the United States District Court for the Southern District of Alabama. On March 13, 1992, Magistrate Judge William Cassady recommended that the writ be granted. That Recommendation was adopted by the District Court on April 30, 1992.

On June 2, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed the

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[1]That statute is now codified at §13A-12-231, Code of Alabama. Appendix "A".

District Court's Order granting the writ in an unpublished per curiam opinion.

STATEMENT OF THE FACTS

In the early morning hours of Sunday, June 28, 1987, Richard Bryars, a deputy sheriff of Baldwin County, Alabama, concealed himself in the woods near the Respondent's house. He observed one Clinton Tolbert drive up and enter the defendant's residence. A few minutes, Tolbert and the Respondent emerged from the residence carrying an ice cooler which was then placed in Tolbert's car. Tolbert then drove to the home of Gordon Dixon, a Baldwin County deputy sheriff who was working undercover and posing as a buyer of marijuana. Dixon and Tolbert transferred the ice cooler to Dixon's car. Dixon opened the cooler and observed five (5) large zip-lock bags containing green plant material. The five bags were contained inside a large green plastic garbage bag. Officer Dixon and Tolbert then proceeded to leave in Dixon's car and they were later stopped by other

officers. The ice cooler and its contents were seized. Respondent's fingerprints were found on four of the five individual zip-lock bags and his fingerprint was found on the large garbage bag containing all of the zip-lock bags. The total weight of the green plant material, later identified as marijuana, constituted 4.845 lbs.

Respondent was convicted of trafficking in marijuana under §20-2-80 for possessing and selling marijuana in an amount that exceeded 2.2 lbs. as required by statute. [See Appendix "A"]

On appeal to the Alabama Court of Criminal Appeals, Respondent argued that the prosecution had failed to prove that he possessed 2.2 lbs. of "marijuana" as defined by the Alabama Supreme Court's interpretation of §20-2-80 contained in Ex Parte Bohannon, 564 So.2d 854 (Ala. 1988). In Ex Parte Bohannon, the Court had held that marijuana stalks and sterilized seeds incapable of germination had to be excluded from the total weight of the plant material before the amount of statutory "marijuana" could be determined. Respondent argued that the prosecution had

failed to show that all of the 4.8 lbs of plant material was marijuana because it had failed to exclude the stalks and seeds from the total weight of the plant material. He thus argued that it was impossible to determine from the State's evidence that he had possessed in excess of 2.2 lbs of marijuana as defined by statute.

The Alabama Court of Criminal Appeals affirmed the Respondent's conviction. Browning v. State, 549 So.2d 548 (Ala. Cr. App. 1989). That Court held that since the criminalist testified that the plant material was marijuana instead of testifying that the plant material contained marijuana, the State's evidence was sufficient to satisfy the requirements of Ex Parte Bohannon, Id. The Court further held that since the criminalist testified that less than one percent (1%) of the microscopic fragments found in plant material was non-marijuana, the State had properly proved that Respondent possessed in excess of the statutorily required amount of 2.2 lbs. The Court held that even though the prosecution had failed to show that

the seeds had been tested for germination, the burden had shifted to Respondent to prove that the seeds were excludable. The Court of Criminal Appeals' holding in Respondent's case was consistent with its construction of Ex Parte Bohannon in Day v. State, 539 So.2d 410 (Ala. Cr. App. 1988), a case decided prior to Respondent's case, and consistent with the Court's holding in Wright v. State, 570 So.2d 872 (Ala. Cr. App. 1990) which was decided subsequent to Respondent's case. Respondent's Petition for Writ of Certiorari to the Alabama Supreme Court was denied. However, subsequent to the decision in Respondent's case, the Alabama Supreme Court granted certiorari in Presley v. State, 587 So.2d 1022 (Ala. Cr. App. 1991) and there held that the Alabama Court of Criminal Appeals had been misapplying its Ex Parte Bohannon decision. The Alabama Supreme Court emphasized that the State had to prove that seeds were capable of germination before the seeds could be considered "marijuana" as defined by statute.

Respondent then filed his federal habeas corpus petition in the District Court which granted his request for relief. The District Court, on the basis of Ex Parte Presley, held that the Alabama Court of Criminal Appeals had misapplied the State's trafficking statute when it held that the prosecution had presented sufficient evidence to convict Respondent of trafficking in marijuana and that the burden had shifted to Respondent to prove the marijuana contained excludable matter. The District Court then held that Respondent was entitled to habeas relief on the ground that the evidence was insufficient to sustain the conviction of trafficking in marijuana under the standards of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2871, 61 L.Ed.2d 560 (1979). The Petitioners were ordered to resentence him for either felony or misdemeanor possession of marijuana or release him.

On appeal to the Circuit Court of Appeals for the Eleventh Circuit, the Petitioners argued that the question of whether the State had

satisfied the evidentiary requirements of the state statute to prove "marijuana" was a matter of state law. The Petitioners further argued that since the Alabama Court of Criminal Appeals had held that the prosecution's evidence satisfied Ex Parte Bohannon, that evidentiary finding was binding on the federal habeas corpus court, even if that ruling was incorrect as a matter of state law. Even if the Alabama Court of Criminal Appeals had misapplied Ex Parte Bohannon, it was outside the authority of the federal habeas court to correct the state appellate court on the interpretation of state law, especially where the State Supreme Court had the opportunity to review the ruling and declined to grant the petition for certiorari.

The Eleventh Circuit Court of Appeals affirmed the granting of the writ without opinion.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF THE FEDERAL DISTRICT COURT HAS EXCEEDED THE SCOPE OF FEDERAL HABEAS REVIEW AND HAS INTERVENED IN MATTERS OF STATE LAW, WHERE IT SOUGHT TO DETERMINE THAT THE ALABAMA COURT OF CRIMINAL APPEALS HAD MISAPPLIED STATE LAW AS DETERMINED BY THE STATE SUPREME COURT, AND HAS GRANTED RELIEF ON THE BASIS OF THAT ALLEGED MISAPPLICATION OF STATE LAW.

The basic question presented in this case is whether a federal habeas court which finds that a state court has misapplied state law can grant habeas relief in order to correct the error. As a corollary, but equally important question, is whether a federal habeas corpus court can grant relief on the ground of insufficiency of evidence under the authority of Jackson v. Virginia, 443 U.S. 207, 99 S.Ct. 2871, 61 L.Ed.2d 560 (1979), where the alleged insufficiency is not based upon a lack of evidence produced by the State, but is based upon a finding of that a lower state court has misinterpreted a higher state court's opinion regarding the burden of proof to exclude some

excludable plant material once the State had proved that Respondent possessed the amount of marijuana as required by the state statute.

The District Court's granting relief on the grounds that the state court misapplied its own law is clearly in violation of Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). In Beck, the Court stated:

> "...if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . ." Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106, 64 L.ed. 476, 480, 80 S.Ct. 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

The Beck line of authority holding that erroneous interpretation of state law by state courts does not constitute a federal constitutional question was re-affirmed in Engle

v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) [footnote No. 21]:

> "We have long recognized that a "mere error of state law" is not a denial of due process. Gryger v. Burke, 334 U.S. 728, 731, 91 L.Ed.1682, 68 S.Ct. 1256 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." L.Ed.2d at 796.

Since the only facts to support the district court's granting of the writ was the finding that the Alabama Court of Criminal appeals had misapplied state law as defined by the State Supreme Court, the district court was issuing a writ on a question that did not involve federal constitutional law and thus, this granting of the writ is due to be reversed.

Although the district court attempted to cast this issue as an insufficiency of the evidence claim under Jackson v. Virginia, supra, this claim had nothing to do with a Jackson insufficiency claim since the State proved that Respondent was in possession of 4.8 lb of marijuana plant material while the state statute

only required 2.2 lbs. Instead, this was a "burden to disprove a negative" type of issue. The confusion in the Alabama Court of Criminal Appeals was not regarding the amount of marijuana that had to be proved, but rather which party had the duty to exclude any excludable plant material once the State had proved that Respondent possessed in excess of 2.2 lbs. The District Court treated the duty of the State to exclude the material as required by Ex Parte Bohannon as though it was an element of the offense rather than properly treating it as the equivalent of a burden to disprove an affirmative defense [the affirmative defense being that even if the Respondent possessed the marijuana plant material as alleged by Petitioners, he nevertheless was not criminal liable because the plant material was excludable from the statutory definition of marijuana].

This Court noted in Engle v. Issac, supra, that the mere fact that the prosecution is required to prove a fact does not automatically make that fact an element of the offense:

> "Our opinion suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare Mullaney v. Wilbur, supra, with Patterson v. New York, supra. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes." Id. at L.Ed.2d 795-796.

Since that statute defining trafficking did not, on its face, require the State to exclude any excludable matter and since that burden was placed on the State by the Alabama Supreme Court's interpretation of the statute, the question here is whether the Jackson v. Virginia requirement that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" is applicable where the State did prove the essential element

of the offense, namely that Respondent possessed in excess of 2.2 lbs of plant material containing marijuana, but failed to exclude any excludable matter.

CONCLUSION

It is obvious that the district court violated the rules of habeas corpus law as stated by this Court when it granted federal habeas relief merely because the State intermediate appellate court misapplied state law to Respondent's case and where the issue involved was not a federal constitutional issue.

Secondly, the district court misapplied Jackson v. Virginia because that case is applicable only where the State fails to present enough evidence from which a rational trier of

fact could find the essential elements of the crime. Clearly, a rational trier of fact could have found that the 4.8 lbs of plant material possessed by Respondent contained at least 2.2 lbs of marijuana as defined by state law.

Lastly, Respondent's habeas corpus claim should have been raised and decided under a different type of due process claims: that is, the district court should have limited its review to a question of whether the state trial court's failure to sustain his objection and to force the prosecution to exclude properly excludable material, if there was any, was so fundamentally unfair that deprived him of due process. E.g., Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Also CF. Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) ["absent a specific constitutional violation, federal

habeas corpus review of trial error is limited to whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process."]

Respectfully submitted,

JAMES H. EVANS
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BY-

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APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX "A"

(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis."

ALA. CODE §13A-12-231 (Cum.Supp.. 1991); ALA. CODE §20-2-80 (1975) (same).

Marijuana is defined in §20-2-2(15) of the Code of Alabama 1975 as follows:

All parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, sale, derivative, mixture or preparation of the plant, its seeds or resin. Such term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIAM PELHAM BROWNING, :

Petitioner, :

vs. : CA 91-0117-CB-C

JAMES E. CARVER, :

Respondent. :

REPORT AND RECOMMENDATION

William Pelham Browning, a state prisoner presently in the custody of respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. 2254. Petitioner is challenging the validity of his April 8, 1988 conviction on one count of trafficking in cannabis in the Circuit Court of Baldwin County, Alabama. Browning was sentenced to twelve (12) years imprisonment. Petitioner's conviction and sentence were upheld on appeal. Browning v. State, 549 So.2d 548 (Ala.Crim.App. 1989).

In his petition, as amended, Browning raises the following grounds which he claims entitle him to relief:

(1) constitutionally insufficient evidence to support his conviction;

(2) the trial court committed reversible error in refusing to continue his case from the April 1988 term;

(3) the trial court committed reversible error in denying defense counsel's request to voir dire the jurors individually; and

(4) the trial court had a duty to continue the petitioner's case upon learning of an unauthorized communication between jurors and third persons.

Respondent admits that petitioner has exhausted his state remedies. Therefore, the case is ripe for a decision by this Court.

This cause is before the Court on the petition, as amended, respondent's answer with attachments and petitioner's "traverse to return." The Magistrate Judge has made a careful review of the record and finds that it contains sufficient facts upon which the issues under consideration may be properly resolved. Therefore, no evidentiary hearing is required.

FACTS

On June 28, 1987, in the course of an undercover operation, Baldwin County Sheriff's deputies were performing surveillance of a vehicle drive by Clinton Tolbert and the Lillian, Alabama home of petitioner. (See T.T. 106-26) Investigator Gary Smith's check point station was Bob's Superette at Highway 98 and County Road 91. (T.T. 125) Smith observed Tolbert's black and white Lemans heading east on Highway 98 (T.T. 126-27) toward Lillian (see T.T. 126) at approximately 7:30 a.m. (T.T. 128) Smith followed Tolbert's car briefly and then returned to his check point and contacted Sergeant Paul Surrey. (T.T. 127)

Investigator Richard Bryars was stationed in the woods near Browning's home. (T.T. 108-09) Bryars observed Tolbert park his black and white Pontiac in front of petitioner's residence and enter the house. (T.T. 110) Tolbert emerged from the house a few minutes later with Browning. (T.T. 111) The two men were carrying between them a white and dark colored ice cooler which

they placed into the white and black car. (T.T. 112) Tolbert then got into the car and left the area (T.T. 112-13); Bryars communicated with Investigator Long that the vehicle was moving.

At approximately 8:00 a.m. Investigator Smith observed the same vehicle heading west on Highway 98. (T.T. 128) The vehicle turned north on County Road 91. (Id.) Smith allowed the vehicle to continue north and notified Investigator Surrey of the direction the vehicle was moving. (Id.) Smith followed the vehicle north on County Road 91 to a dirt road. (T.T. 129) Smith did not follow the vehicle up the dirt road. (Id.) Smith contacted Sergeant Surrey (T.T. 131) and then positioned himself at the CC Road (T.T. 132).

Deputy Gordon Dixon lived at the end of the dirt road Tolbert turned onto. (T.T. 128-29) Dixon, who was posing as one who desired to buy marijuana (T.T. 166), met Tolbert at his driveway and transferred a cooler from Tolbert's car to the back seat of his car. (T.T. 159) Dixon looked inside the cooler and observed a green lawn bag in which he saw five large zip-lock

bags containing green plant material. (See T.T. 160) Dixon and Tolbert got into the car, travelled down the dirt road and took a right turn on County Road 91. (T.T. 163) Shortly thereafter, Dixon's car was stopped by Surrey, and the two men were taken into custody. (T.T. 164-65) The arrests were recorded at 8:15 a.m. (T.T. 168)

Gary Wallace, a criminalist with the Alabama Department of Forensic Sciences, received some evidence from Instigator Smith on July 2, 1987, concerning the petitioner. (T.T. 183) Inside the brown paper bag Wallace received from Smith was a green plastic bag which, in turn, contained five plastic bags containing plant material. (T.T. 184) The plant material was removed from the bags and the bags were turned over to Brian Delmas, a fingerprints experts. (See T.T. 189) Delmas determined that petitioner's latent prints were on four of the five zip-lock bags and the green lawn bag as well. (T.T. 215-16)

Wallace visually examined all of the contents of the five bags by spreading the material out and determined, by microscopically examining a portion of the material that, with the exception of some microscopic fragments of other material, the whole amount was marijuana. (T.T. 191 & 198-99) Wallace was of the opinion that the microscopic fragments were less than one percent of the entire amount of material. (T.T. 192) Wallace measured the material and it weighed 4.845 pounds. (T.T. 195) Wallace admitted on cross-examination, however, that he did not break all of the material apart on visual examination to check for stalks or seeds (T.T. 201) and that he did not perform any germination tests on the seeds (T.T. 198). Wallace testified that there were seeds in the material (T.T. 198) as well as "stick" portions (T.T. 199). The criminalist did not chemically test any of the

non-leaf material. (See T.T. 199)[1] On further redirect, Wallace testified that he examined some of the stems microscopically and it was his opinion that the stems were marijuana. (T.T. 203)

DISCUSSION

A. Sufficiency of the Evidence. Petitioner argues that the record does not contain sufficient evidence from which a reasonable juror could convict him of trafficking in marijuana in violation of §20-2-80(1) of the Alabama Code, now modified at §13A-12-231(1) Specifically, Browning contends that the State did not prove that he was in possession of more than 2.2 pounds of marijuana as required by the statute. At issue here is sufficiency of the weight evidence only.

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[1]Chemical tests, including the modified Duguenoid Lavine tests, are performed on only a small portion of the material as the material is destroyed during the test. (T.T. 203)

"The federal courts play a limited role in weighing the constitutional sufficiency of evidence in a state criminal prosecution." Heath v. Jones, 863 F.2d 815, 819 (11th Cir. 1989). The sole question to be answered in habeas cases is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S.207, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); Mattox v. Dugger, 839 F.2d 1523, 1524 (11th Cir.), cert.denied, 488 U.S. 833, 109 S.Ct. 92, 102 L.Ed.2d 68 (1988); Fallada v. Duager, 819 F.2d 1564, 1570 (11th Cir. 1987).

Under Alabama law,

> (1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis."

ALA. CODE §13A-12-231 (Cum.Supp. 1991); ALA. CODE §20 2-80 (1975)(same).

Marijuana is defined in §20-2-2(15) of the Code of Alabama 1975 as follows:

> All parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. Such term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

For years, the Alabama Court of Appeals held that once the State had proven the requisite weight in excess of 2.2 pounds, the burden was on the defendant "to bring himself within any exclusion contained in the definition of 'marijuana."' Weaver v. State, 418 So.2d 202 (Ala.Crim.App. 1982); see also Dickerson v. state, 414 So.2d 998 (Ala.Crim.App. 1982) (defendant "must establish that the marijuana seized from his residence contained excludable matter falling within the definition of such under §20-2-2(15)"). In Ex parte Bohannon, 564 So.2d

854 (Ala. 1988), the Alabama Supreme Court determined that the State had not proven that the defendant possessed in excess of 2.2 pounds of marijuana as that term is defined in §20-2-2(15) of the Alabama Code. Id. at 858. Specifically, the Alabama Supreme Court, in a break from Dickerson and its progeny, held that in light of the toxicologist's admission that stems and seeds were present in the material he weighed and the seeds were not tested to determine if they were sterile or infertile "there was insufficient evidence to prove that the green plant material contained in excess of 2.2 pounds of marijuana." Id. The State is required to prove that seeds found in plant material are not "'sterilized."' Id. In Dickerson, supra, the Alabama Court of Criminal Appeals held that the burden of establishing that seeds are sterilized is upon the defendant. Id. at 1003. The Bohannon court, however, still spoke of the burden shifting set out in Dickerson, 564 So.2d at 858. Thus, in the Alabama Court of Criminal Appeals decision in this case, Browning v. State, 549

So.2d 548 (1989) and their decision in Wright v. State, 570 So.2d 872 (1990), Alabama's intermediate appellate court continued to hold that once the State procures testimony that certain plant material is marijuana and that all the material weighs in excess of 2.2 pounds, the burden shifts to the defendant to prove that the marijuana contains excludable matter. Wright, 570 So.2d at 874; Browning, 549 So.2d 550 (burden shifted to defendant "to prove that some portion of the total weight was excluded by the statute").

In Ex parte Presley, 587 So.2d 1022 (Ala. 1991), the Alabama Supreme Court reaffirmed what they thought was the clear holding in Bohannon that the burden-shifting analysis set out in Dickerson and its progeny was no longer to be used by Alabama courts. Id. at 1024. Presley did away with any confusion created in the Alabama Court of Criminal Appeals by Bohannon.

In Presley, as in Bohannon, the State toxicologist testified that the plant material weighed was marijuana and was in excess of 2.2

pounds. Id. at 1025. Seeds were weighed with the other plant material and these seeds were never tested to see if they met the statutory definition of marijuana. Id. Therefore, the defendant's conviction was reversed due to insufficient evidence. Id.

Thus, the State of Alabama must prove that all of the material "it relies on to equal 2.2 pounds" is marijuana as defined by statute. Presley, 587 So.2d at 1024; see Bohannon, 564 So.2d at 858 ("[I]n order to prove that the material the toxicologist weighed contained in excess of 2.2 pounds of statutorily defined marijuana, the State must prove that the seeds were not 'sterilized"'). Material to be excluded from the weight computation includes stalks, stems and sterilized seeds. Bohannon, 564 So.2d at 858.

In this case, the State's expert testified that the plant material he analyzed, save for

some microscopic fragments[2] of other materials, was marijuana and that the entire material weighed 4.845 pounds. Wallace did not identify these microscopic fragments. The court is therefore in the dark as to whether those fragments were particles of dirt or even bugs as opposed to seeds and stems. The plant material he referred to as marijuana, however, clearly contained stems and seeds. The stems were not microscopic.[3] Wallace did not test the seeds to determine if they were sterile or infertile, nor did he chemically analyze the stems. Further

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[2]Wallace testified that in his opinion the microscopic fragments were less than one percent of the entire amount of material.

[3]The definition of microscopic is "so small as to be invisible or indistinct without the use of the microscope." The American College Dictionary, at 769 (1970). At trial, defense counsel and the expert identified stems in the marijuana. (T.T. 199) Thus, the stems were not microscopic. Apparently, the marijuana seeds were not microscopic either. (See T.T. 198)

more, Wallace clearly weighed the stems and seeds with the other plant material.[4]

Considering this evidence in light of Alabama caselaw and keeping in mind the standard set forth in Jackson v. Virginia, supra, the Magistrate Judge must conclude that no rational trier of fact could have found the essential elements of trafficking in marijuana beyond a reasonable doubt. Pure and simply, the State did not prove that Browning was in possession of in excess of 2.2 pounds of marijuana. On the basis of the evidence presented, the Court has no idea if the seeds were sterilized and if so, the weight of the sterilized seeds and stems. Without such evidence, no one could determine that the defendant was in possession of in excess of 2.2 pounds of marijuana. Accordingly, the Magistrate Judge recommends that the writ be granted

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[4]The statement by the Alabama Court of Criminal Appeals in its decision that "[t]he microscopic fragments were weighed separately" 549 So.2d at 550, is simply not supported by the evidence.

unless the State enters judgment in Browning's favor as to the trafficking charge. See Bohannon v. State, 564 So.2d 859 (Ala.Crim.App. 1988)(On remand from Alabama Supreme Court the appellate court reversed Bohannon's conviction for trafficking in marijuana). The Alabama appellate courts have the option to determine whether the State proved each and every element of possession of marijuana, ALA. CODE §20-2-70, the lesser included offense of the crime charged, and if the evidence supports conviction on the lesser included offense, the appellate courts may enter judgment and remand to the trial court for sentencing. Beverly v. Jones 854 F.2d 412, 415 (11th Cir. 1988), cert.denied, 490 U.S. 1082, 109 S.Ct. 2104, 104 L.Ed.2d 665 (1989).[5]

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[5]Possession of marijuana is now prescribed in §§13A-12-213, -214 of the Alabama Code. Former §20-2-70 of the Alabama Code prescribed possession of marijuana for personal use, a misdemeanor, and possession of marijuana for other than personal use, a felony. The undersigned is of the opinion that Alabama's appellate courts, rather than this Court, should

(Footnote Continued)

CONCLUSION

It is the Magistrate Judge's opinion that petitioner's constitutional rights were violated in this cause. Therefore, the undersigned recommends that the Court should conditionally grant the petition for habeas corpus. If the State of Alabama does not reverse Browning's trafficking conviction and resentence him for felony or misdemeanor possession of marijuana, within ninety (90) days after this Court's judgment is final, then he should be released.

RELEASE OF PETITIONER ON APPEAL

Should the District Judge adopt this recommendation as the opinion of the Court and grant a conditional writ of habeas corpus, the Magis-

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(Footnote Continued)
determine whether the evidence supports a conviction of possession of marijuana for other than personal use as opposed to possession of marijuana for personal use, even though petitioner makes no argument that he was never in actual or constructive possession of marijuana.

trate Judge further recommends that petitioner be released from custody pending an appeal, if any, by the respondent. Petitioner has no prior felony convictions, and the Court therefore considers him an appropriate candidate for release.

In determining whether a successful habeas petitioner should be released pending the State's appeal, the Court should consider such factors as the possibility of the prisoner's flight; the risk that the prisoner will pose a danger to the public if released; the State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal; and the prisoner's substantial interest in release pending appeal. Hilton v. Braunskill, 481 U.S. 770, 777, 107 S.Ct. 2113, 2119-20, 95 L.Ed.2d 724 (1987). After consideration of the presumption favoring release, and there being no evidence that there is a risk of

flight or dangerousness,[6] the Magistrate Judge concludes that incarceration during the appeal process is not warranted.[7] A recommended bond would be $45,000.00, the same amount of his appeal bond set by the Baldwin County Circuit Court on June 30, 1988.

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[6] Petitioner is apparently still married and has five children.

[7] Federal Rule of Appellate Procedure 23(c) provides that when the Government appeals a decision granting a writ of habeas corpus, the habeas petitioner shall be released from custody "unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Federal Rule of Appellate Procedure 23(d) states that initial orders issued pursuant to Rule 23(c) shall "govern review in the court of appeals and in the Supreme Court unless for special reasons shown . . . the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made."

Hilton, 487 U.S. at 772, 107 S.Ct. at 2116-17 (footnote omitted).

The attached sheet contains important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this 13th day of March, 1992.

WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6451

D. C. Docket No. 91-0117

WILLIAM PELHAM BROWNING,

Petitioner-Appellee,

versus

JAMES E. CARVER,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(June 2, 1993)

Before BIRCH, Circuit Judge, CLARK, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

Judgment Entered: June 2, 1993
For the Court: Miguel J. Cortez. Clerk
By: /s/Karleen McDabb
Deputy Clerk

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*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.